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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-3

CURTIS PARHAM,

Appellant

v.

ELLIS FRANKLIN HUGHES,

Appellee

On Appeal from the Supreme Court of the State of Georgia

BRIEF OF APPELLANT

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OPINIONS BELOW

The Opinion of the Supreme Court of Georgia is reported at *241 Ga. 198*. The unofficial citation is *243 S.E. 2nd 867*. A copy of the Opinion of the Supreme Court of Georgia may be found in the Jurisdictional Statement at Page 1a.

JURISDICTION

Jurisdiction in this Court is invoked pursuant to *28 United States Code 1257(2)* since there is drawn in ques-

tion the validity of a state statute contended to be repugnant to the United States Constitution and the decision of the Georgia Supreme Court was in favor of the validity of that statute. The trial court below concluded that the statute in question, Georgia Wrongful Death Statute, *Georgia Code Annotated* § *105-1307*, was repugnant to the Due Process and Equal Protection Clauses of the *5th* and *14th Amendments* to the United States Constitution. The trial court concluded that the statute violated the Due Process and Equal Protection Clauses of the United States Constitution by allowing the mother of an illegitimate child to sue for the wrongful death of that child while denying that right to the father of the illegitimate child. A copy of the trial court's Opinion may be found in the Appendix at Page 3.

The Georgia Supreme Court reversed the Decision of the trial court, upholding the validity of the Georgia Wrongful Death Statute and concluded that it did not constitute a denial of equal protection or violation of due process by allowing the mother of an illegitimate child to sue for its wrongful death and denying that right to the father even in cases like the present one, where the natural mother was deceased and the natural father had supported the child from its birth until its death, acknowledged the child by the execution of its birth certificate and maintained constant contact with the child through almost daily visitation from its birth until its death.

The Opinion of the Georgia Supreme Court from which this Appeal is taken is dated April 4, 1978, and was entered on the 4th day of April, 1978. A Motion for Rehearing in the matter was timely filed on April 12, 1978, and the Motion for Rehearing was denied on April 19, 1978. A copy of the Denial of the Motion for Rehearing may be found in the Jurisdictional Statement at Page 13a.

A Notice of Appeal to the United States Supreme Court was timely filed on the 28th day of April, 1978, in the Supreme Court of Georgia. A copy of the Notice of Appeal to the United States Supreme Court may be found in the Jurisdictional Statement at Page 14a.

This Court noted probable jurisdiction on October 2, 1978.

As mentioned previously, the statutory provision conferring jurisdiction on this Court is *28 United States Code 1257(2)* since the case involves the question of the validity of a state statute challenged as being repugnant to the Constitution of the United States and the Decision of the Georgia Supreme Court was in favor of the validity of this statute.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A.

1887 Georgia Laws, pp. 43-45; *1952 Georgia Laws*, pp. 54 (*Georgia Code Annotated* § 105-1307):

"§ *105-1307 Homicide of Child.*

A mother, or, if no mother, a father may recover for the homicide of a child, minor or sui juris, unless said child shall leave a wife, husband or child. The mother or father shall be entitled to recover the full value of the lief of such child. *In suits by the mother the illegitimacy of the child shall be no bar to a recovery.*"

(Emphasis Added)

B.

1972 Georgia Laws, pp. 494-495 (*Georgia Code Annotated* § 74-202):

"§ *74-202 Father's Obligation to Support.*

The father of an illegitimate child shall be bound to maintain him until said child reaches the age of

eighteen, marries or becomes self-supporting, whichever occurs first. This obligation shall be good consideration to support a contract by him. He may voluntarily discharge this duty; if he shall fail or refuse to do it, the law will compel him: provided however, that the Superior Court shall have the power, upon petition of the father to require the mother of an illegitimate child to contribute to such support upon a determination that the financial circumstances of both the father and the mother are such that justice and equity require the mother to share in or have responsibility for such support."

C.

14th Amendment to the United States Constitution

"*14th Amendment to the United States Constitution —Citizenship.*

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

D.

28 United States Code 1257(2)

"*28 United States Code 1257(2) State Courts; Appeals; Certiorari.*

Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows:

(2) By Appeal where is drawn in question the validity of a statute of any state on the ground of

its being repugnant to the Constitution, Treaties or Laws of the United States and the decision is in favor of its validity."

QUESTIONS PRESENTED

I.

WHETHER GEORGIA CODE ANNOTATED § 105-1307 VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE 5TH AND 14TH AMENDMENTS BY ALLOWING THE MOTHER OF AN ILLEGITIMATE CHILD TO RECOVER FOR ITS WRONGFUL DEATH BUT DENYING THAT RIGHT TO THE FATHER OF AN ILLEGITIMATE CHILD.

(A) WHETHER THERE ARE LEGITIMATE STATE INTERESTS WHICH JUSTIFY ALLOWING THE MOTHER OF AN ILLEGITIMATE CHILD TO SUE FOR ITS WRONGFUL DEATH AND DENYING THAT RIGHT TO THE FATHER OF SAID CHILD.

(B) WHETHER GEORGIA CODE ANNOTATED § 105-1307 PROMOTES OR IS RATIONALLY RELATED TO ANY LEGITIMATE STATE INTEREST WHICH MIGHT JUSTIFY ALLOWING THE MOTHER OF AN ILLEGITIMATE CHILD TO SUE FOR ITS WRONGFUL DEATH AND DENYING THAT RIGHT TO THE FATHER OF SAID CHILD.

II.

WHETHER THE GEORGIA WRONGFUL DEATH STATUTE WHICH ALLOWS THE MOTHER OF AN ILLEGITIMATE CHILD TO RECOVER FOR ITS WRONGFUL DEATH BUT DENIES THAT RIGHT TO THE FATHER CONSTITUTES IMPERMISSIBLE DISCRIMINATION BASED ON SEX.

STATEMENT OF THE CASE

(A) Statement of the Facts

The Appellant herein, Curtis Parham, was the natural father of Lemuel Parham, a minor child, who was killed in an automobile accident (R-25). The child's natural mother, Cassandra Moreen, was killed in the same accident (R-25). While Appellant and his child's natural mother were never married, the Appellant signed the child's birth certificate acknowledging his paternity (R-24), and the child utilized Appellant's name (Parham), as opposed to the natural mother's name (Moreen) (R-25).

In addition, it was established without contradiction and adopted as findings of fact by the trial court that the Appellant paid the birth expenses for his minor child and supported his minor child from its birth until its death (R-23; A-3). It was established without contradiction and made a part of the trial court's Order, that the Appellant had, at all times, acknowledged the child as his own and was at all times acknowledged by the child as its father; and in addition to paying child support the Appellant maintained and paid charge accounts at grocery stores for food and other necessities to insure the support of this child and further that the Appellant visited regularly with the child and in fact saw him every day and every weekend and had the child with him for many complete weekends (R-23; A-3).

Following the death of his minor child in an automobile accident which also claimed the life of the child's mother, Appellant filed this original action seeking to recover for the wrongful death of his minor child in the Superior Court of Richmond County, Georgia, on February 7, 1977 (R-3).

The original complaint named the Appellee herein as defendant and charged said Appellee with negligence in

the death of the minor child and sought recovery for that death (R-3 through 6). An explanation of the proceedings which account for the present status of the case is contained below.

(B) The Proceedings Below

As stated above, the Appellant filed this original complaint seeking to recover for the wrongful death of his child on February 7, 1977 (R-3). The Appellee herein filed responsive pleadings to the complaint (R-8 and 9). The maternal grandmother, acting as Administratrix of the Estate of the deceased child, then filed a complaint in the Superior Court of Richmond County, Georgia, seeking also to recover for the wrongful death of the child and naming the Appellee herein as defendant (R-15).

The Appellee herein then filed a Motion for Summary Judgment Against the Appellant, Curtis Parham, contending that *Georgia Code Annotated* § 105-1307 prevented the Appellant from recovering for the wrongful death of his illegitimate child. Georgia Code Annotated § 105-1307 (*1887 Georgia Laws*, 43, 45; *1952 Georgia Laws*, 54) provides:

> "A mother, or if no mother, a father, may recover for the homicide of a child, minor or sui juris, unless said child shall leave a wife, husband or child. The mother or father shall be entitled to recover the full value of the life of such child. In suits by the mother, the illegitimacy of the child shall be no bar to a recovery."

Appellee relied on this statutory provision which allows the mother of an illegitimate child to sue for its wrongful death but denies that right to the father (R-14).

The trial court, Superior Court of Richmond County, Georgia, denied the Appellee's Motion for Summary Judg-

ment (R-25; A-3). In so doing, the court concluded that the Appellant herein, the natural father of the child, was the proper party to maintain an action for the alleged wrongful death of his minor child and found *Georgia Code Annotated* § 105-1307 to be in violation of the Due Process and Equal Protection Clauses of the United States Constitution. In its Order the court made findings of fact and conclusions of law. The Order is set forth in its entirety in the Appendix at Page 3. The court found the Georgia Wrongful Death Statute deficient in three regards. The court concluded:

1.

"To the extent that the Georgia Wrongful Death Statute conditions the right of either parent to sue for the wrongful death of its child upon the legitimacy or illegitimacy of the child, that Statute constitutes a denial of Equal Protection and Due Process within the meaning of the *5th* and *14th Amendments* to the United States Constitution."

2.

"To the extent that the Georgia Wrongful Death Statute purports to allow the mother of an illegitimate child to maintain an action for the wrongful death of that child and denies that right to the father of an illegitimate child, that Statute constitutes a denial of Equal Protection and Due Process in violation of the *5th* and *14th Amendments* to the United States Constitution."

3.

"Where the state imposes the primary support obligation for illegitimate children upon the father of those children and where the father of an illegitimate child in fact has provided some level of support for that child and has acknowledged his paternity by execution of the birth certificate and has in every respect treated the child as his own, the State cannot

constitutionally deny that father the right to maintain an action for the wrongful death of his child where the mother of said child is also deceased."

The court concluded in its findings of fact that although the Appellant, as the natural father of the deceased minor child, had never married the natural mother, that Appellant had executed the birth certificate acknowledging his paternity of the child and had paid the birth expenses for the birth of said child and had regularly supported the child from its birth until its death (A-3). The court further found that the Appellant had, at all times, acknowledged the child as his son and was at all times acknowledged by the child as his father and that in addition to paying child support, the Appellant had maintained charge accounts at grocery stores for food and other necessities to further insure the support of this child and had visited regularly with the deceased minor child and, in fact, saw him virtually every day (A-3).

Following the Order of the trial court finding the Georgia Wrongful Death Statute in violation of the Due Process and Equal Protection Clauses of the United States Constitution, the Appellee herein was granted a Certificate of Immediate Review by the trial court (R-30). The Georgia Supreme Court granted the Appellee's Application for Interlocutory Appeal on October 13, 1977 (R-1). On April 4, 1978, the Georgia Supreme Court reversed the Decision of the trial court, concluding that the Georgia Wrongful Death Statute does not violate the Due Process or Equal Protection Clauses of the United States Constitution (Jurisdictional Statement —Page 1a). The Supreme Court failed to address the issue of sex-based discrimination although that issue was raised and argued in Appellant's Brief.

Following this Decision by the Georgia Supreme Court the Appellant's Motion for Rehearing was denied on

April 19, 1978 (See Jurisdictional Statement—Page 13a). On the 28th day of April, 1978, Appellant herein timely filed a Notice of Appeal to the United States Supreme Court (A-11). The Appeal was filed pursuant to *28 United States Code 1257(2)* since the case draws into question the validity of a state statute on the grounds that it is repugnant to the United States Constitution and the Decision of the Georgia Supreme Court was in favor of the validity and constitutionality of that statute (Jurisdictional Statement—Page 1a).

SUMMARY OF ARGUMENT

I.

The present Georgia Wrongful Death Statute as embodied at *Georgia Code Annotated* § 105-1307 allows the mother of an illegitimate child to recover for the wrongful death of that child but denies that right to the father. The Supreme Court of Georgia reversed the decision by the trial court and ruled that the Georgia Wrongful Death Statute was not repugnant to the Equal Protection and Due Process Clauses of the United States Constitution. In reversing the trial court, the Georgia Supreme Court asserted four allegedly valid state interests promoted by the classification in issue.

Two of those asserted state interests have been considered at length by this Court and rejected. The first centers around problems of proof of paternity. This Court has concluded on numerous occasions that while problems centering around proof of paternity might justify strict standards of proof, they can very seldom if ever justify the total statutory exclusion of a class of illegitimates. Moreover, paternity was conclusively established in the present case as demonstrated by the Record which clearly demonstrates the fallacy of irrebuttable presumptions and the total exclusion of all members of a class in situations like the present one.

Secondly, the Georgia Supreme Court contended that the present classification was justified since the Appellant could have avoided any unconstitutional impact of the classification by legitimating the child or marrying the mother. In the 1977 case of *Trimble* v. *Gordon*, 430 U.S. 762 and the 1972 case of *Stanley* v. *Illinois*, 405 U.S. 645, this Court routinely rejected these contentions. The Court made it abundantly clear that the question to be decided is whether the classification is consistent with the Equal Protection Clause and not whether any unconstitutional impact of the classification may be avoided by alternative action.

The remaining asserted state interests by the Georgia Supreme Court cannot possibly be promoted by the classification at issue in the present case and there was no effort by the Georgia Supreme Court to demonstrate any means by which these classifications could be construed to be promoted by the present classification. The remaining interests asserted by the Georgia Supreme Court center around the state's interest in encouraging legitimation, insuring high standards of morality and avoiding spurious claims. The Georgia Supreme Court totally fails to demonstrate how these admittedly valid state interests are promoted by a classification which punishes one party to an illegitimate act and rewards the other party to that illegitimate act. In short, the Court totally fails to demonstrate any relationship whatsoever between the asserted goal and the ability of the classification to promote that goal. These contentions are supported in the Argument and Citation portion of this Brief by reference to this Court's decisions in *Glona* v. *American Guaranty & Liability Insurance Company*, 391 U.S. 73 (1968); *Stanley* v. *Illinois*, supra; *Trimble* v. *Gordon*, supra; and *Weber* v. *Aetna Casualty & Surety Company*, 406 U.S. 164 (1972).

This Court's recent decision in *Quilloin* v. *Walcott*, United States Supreme Court Case No. 76-6372, Decided

January 10, 1978, is readily distinguishable from the present case. In that case the Court simply concluded that a state may have a legitimate interest in adopting different standards in the adoptive process for fathers of illegitimate children and divorced fathers. The Court also partially based it's decision upon the fact that the father of the illegitimate child in *Quilloin*, supra, had never maintained any meaningful relationship with the child whatsoever. In the present case, the classification does not distinguish between parents of illegitimate children and parents of legitimate children. But rather, it distinguishes between two parties to an illegitimate act, rewarding one of those parties and punishing the other. Moreover, the Record conclusively demonstrates in this case that the Appellant in the present case maintained an extremely meaningful relationship with his child by execution of the birth certificate, the payment of the birth expenses, the payment of support from birth until death, the maintenance of charge accounts for the care and support of the child and daily visitation (A-3).

The Appellee asserts two arguments in his Motion to Dismiss, neither of which is pertinent to the issue before the Court. First, the Appellee contends that the Georgia Wrongful Death Statute is not constitutionally inappropriate since it provides an alternative scheme of recovery even though that scheme of recovery excludes the natural father of the child. Appellant submits that the issue before this Court is not whether Georgia has provided an alternative scheme of recovery, but rather whether that alternative scheme of recovery comports with the mandates of the Due Process and Equal Protection Clauses of the United States Constitution.

Secondly, Appellee contends that a decision in favor of the Appellant would subject individuals in the position of the Appellee to the prospect of double recovery and put them to the difficulty of having to locate the

fathers of illegitimate children. Appellant demonstrates in this Brief that this Court has provided for recovery by illegitimates and thereby disrupting other State schemes of recovery without creating the prospect of double recovery, since implicit in this Court's ruling in favor of the Appellant would be a ruling that he is the party entitled to recover to the exclusion of all other parties. Moreover, Appellant demonstrates in his Brief the fallacy of Appellee's argument that he and other similarly situated individuals would be put to the difficulty of locating fathers of illegitimate children. The Appellee's argument assumes that there is no middle ground, that the state must either allow all fathers of illegitimate children to recover or deny that right to all fathers of illegitimate children. Appellant demonstrates in his Brief how the State of Georgia has attained a middle ground between these extremes in the area of adoption. In short, the State of Georgia has not carefully considered the alternatives and could certainly adopt a scheme of recovery demanding strict requirements of the proof without unduly burdening defendants similarly situated to the Appellee in the present case.

II.

Appellant further contends that the present classification constitutes impermissible discrimination based on sex in violation of the Due Process and Equal Protection Clauses of the United States Constitution. The present classification cannot survive the level of scrutiny imposed by the Supreme Court of the United States in the area of gender-based classifications. Since *Reed* v. *Reed*, 404 U.S. 71 (1971), this Court requires that statutory classifications distinguishing between males and females must serve important government objectives and must be substantially related to the achievement of those objectives. The Court has further emphasized that gender-based legislative classification premised on overbroad

generalization concerning the behavior and proclivities of the two sexes cannot be tolerated under the Constitution. (*Stanley* v. *Illinois*, 405 U.S. 645 (1972); and *Stanton* v. *Stanton*, 421 U.S. 7 (1975).

The present decision by the Georgia Supreme Court is replete with the kind of overbroad generalizations and assumptions about "the way men and women are" which this Court has uniformly rejected. The Georgia Supreme Court places the entire burden for the legitimation of children, the incentive to promote a marriage and legitimate family unit upon the father. This burden is not demonstrated or warranted by virtue of any statistics, it is merely asserted.

The Court assumes without proving that all fathers who fail to legitimate the child by petition or by marrying the mother suffer no real loss when their children die (See Jurisdictional Statement—Page 7a).

Appellant further demonstrates in the Argument and Citation portion of this Brief that the generalized objectives asserted by the Georgia Supreme Court cannot possibly be promoted by a classification excluding one party to an illegitimate act from recovery and awarding the right of recovery to the other party to that illegitimate act.

ARGUMENT AND CITATION OF AUTHORITY

I.

GEORGIA CODE ANNOTATED § 105-1307 VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION BY ALLOWING THE MOTHER OF AN ILLEGITIMATE CHILD TO RECOVER FOR THAT CHILD'S WRONGFUL DEATH BUT DENYING THAT RIGHT TO THE FATHER OF THE CHILD.

Appellant submits that the State of Georgia cannot, consistent with the Due Process and Equal Protection Clauses of the United States Constitution, allow the natural mother of an illegitimate child to recover for the wrongful death of that child and deny that right to the father, especially where the natural mother is deceased and the natural father has acknowledged his paternity by executing the birth certificate, paid the birth expenses on the child, supported the child from its birth until its death, maintained charge accounts for the additional support of the child and visited with the child on virtually a daily basis from its birth until its death (R-23 through 27). The trial court agreed with Appellant (A-3). The Georgia Supreme Court reversed asserting four valid state interests allegedly promoted by this classification (Jurisdictional Statement—Page 1a).

In the area of classifications based on illegitimacy, this Court has insisted that the classification bear a rational relationship to a legitimate state purpose. (*Trimble* v. *Gordon*, 430 U.S. 762 (1977)). In *Trimble*, supra, this Court stated:

> "Despite the conclusion that classifications based on illegitimacy fall in a realm of less than strictest scrutiny, *Lucas* also establishes that the scrutiny is not a toothless one, a proposition clearly demonstrated by our previous decisions in this area."

The Georgia Supreme Court correctly stated the test in its Opinion when it concluded:

> "The equal protection test focuses on whether the ends to be reached by the governmental classification are legitimate and whether the means employed to achieve those ends are substantially related to them, i.e. whether the exclusion of fathers of illegitimate children from the benefits of a wrongful death action is substantially related to legitimate state interests." (See Jurisdictional Statement—Page 3a)

This portion of Appellant's Brief will address what the Georgia Supreme Court considered to be legitimate state interests promoted by this classification. In addition, this portion of Appellant's Brief will distinguish this Court's Decision in *Quilloin* v. *Walcott*, United States Supreme Court, Case No. 76-6372, Decided January 10, 1978, and will analyze certain arguments advanced by the Appellee.

(A) There Are No Legitimate State Interests Which Justify Allowing The Mother Of An Illegitimate Child To Sue For That Child's Wrongful Death And Denying That Right To The Father Of The Child.

As previously stated, the Georgia Supreme Court asserted four allegedly valid state interest promoted by this classification. This Court has previously declared that two of these asserted state interests are not sufficient to warrant total statutory exclusion of a class of illegitimates. Appellant will address these two interests asserted by the Georgia Supreme Court initially. The remaining two allegedly valid state interests asserted by the State Supreme Court have been rejected in Decisions by this Court as not being rationally related to and not promoting the interests identified. These latter asserted interests will be discussed secondly.

Initially the Georgia Supreme Court asserts that the State has a legitimate interest in forestalling potential

problems of proof of paternity in wrongful death actions. (See the Georgia Supreme Court Opinion, Jurisdictional Statement—Page 1a, 3a and 4a). With regard to problems of proof of paternity in illegitimacy cases, this Court has stated in *Gomez* v. *Perez*, 409 U.S. 535 (1973):

> "We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an inpenatrable barrier that works to shield otherwise invidious discrimination." (Page 539)

Likewise, in the 1977 case of *Trimble* v. *Gordon*, 402 U.S. 762, this Court stated:

> "Difficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate."

Likewise Appellant submits that difficulties and problems of proving paternity do not justify the total denial of the legal and biological relationship between a father and his illegitimate child, especially where that relationship existed in fact as documented in the present matter. In discussing many of the decisions of the United States Supreme Court, the Fifth Circuit Court of Appeals in the case of *Beaty* v. *Weinberger*, 478 F.2nd 300 (5th Cir. 1973), concluded:

> "What is significant about these cases is the Court's implicit, if not explicit, disavowment of the notion that difficulties of proof are a sufficient or indeed rational basis for discriminating against illegitimates."

With regard to proving paternity, the Fifth Circuit goes on to say:

> "That problem, however, concerns burden of proof. Plainly the problem of proving parentage was viewed as a procedural matter which, of itself, was not sufficient justification for the state to formulate

classifications between legitimates and illegitimates based upon it."

The Fifth Circuit cites this Court's Decision in *Weber* v. *Aetna Casualty & Surety Company*, 406 U.S. 164 (1972).

The Georgia Supreme Court attempted to justify its assertion in this area by concluding:

> "In most circumstances it is the mother, not the father, who raises and cares for the illegitimate child." (See Jurisdictional Statement—Page 7a)

The Georgia Supreme Court, again relying on the norm, concluded:

> "More often than not, the father of an illegitimate child who has elected neither to marry the mother nor to legitimate the child pursuant to proper legal proceedings, suffers no real loss from the child's wrongful death." (See Jurisdictional Statement—Page 4a)

Finally the Georgia Supreme Court justifies the assertion of this interest by stating:

> "Moreover, the father of the illegitimate child is usually the parent in this situation who has control over whether a legitimate family unit will exist." (See Jurisdictional Statement—Page 7a)

It should be noted that the Georgia Supreme Court relied on bare conclusions unsupported in any fashion. However, even given the validity of those assertions, those assertions do not address the Equal Protection Clause of the United States Constitution. The question before this Court is whether even given a situation as described by the Georgia Supreme Court as being the norm, can the State justify the total and absolute exclusion of every father of every illegitimate child in all circumstances from the maintenance of a wrongful death action?

The Decision of this Court and the Decision of Circuit Courts of Appeal would mandate an answer to the question stated above in the negative. The Fifth Circuit in *Beaty* v. *Weinberger*, supra, concluded:

> "We do not here dispute the Secretary's underlying premise that because illegitimate children are less likely to be supported by their fathers than h(2) children—a proposition which we are inclined to accept as true—the former might be required to establish to the satisfaction of the Secretary the entitling facts of parentage and support. Thus it would doubtless be appropriate for Congress to require that post-disability illegitimate children prove those facts. It does not follow, however, that the entire class may be excluded from coverage simply because of a postulated difficulty of proof."

Likewise this Court directly addressed this issue of total exclusion of the class based on the norm in *Stanley* v. *Illinois*, 405 U.S. 645 (1972). This Court concluded in that case:

> "It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. This much the State readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children."

This Court went on to conclude in *Stanley*, supra, at Page 657:

> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formali-

ties, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."

The point made by this Court, by the Fifth Circuit Court of Appeals, and by the Appellant is that the Appellant in the present case had maintained a relationship with his child as meaningful as the relationship between any natural father and his child. To deny the existence of that relationship, either legally or biologically based on problems of proving paternity in most cases, cannot be defended consistent with the Equal Protection and Due Process Clauses of the United States Constitution.

Certainly the State may set exacting standards of proof and place the burden upon the illegitimate father to prove paternity. This suggestion was made by this Court in *Trimble* v. *Gordon*, supra, when the Court concluded:

"The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their father's estates than required either for illegitimate children claiming under their mother's estates or for legitimate children generally." (Page 465)

Likewise the State of Georgia may impose strict requirements with regard to proof of paternity and place the burden upon the father. But Appellant respectfully submits that the State of Georgia cannot deny this Appellant and every father of every illegitimate child the right to recover for the wrongful death of that child by asserting the burden of proof as a legitimate state interest.

Secondly, the Georgia Supreme Court justified its Opinion by reasoning that the State has an interest in encouraging the fathers of illegitimate children to take steps to legitimate the children and that the Appellant in the present matter had the option of legitimating the

child but failed to do so. (See Jurisdictional Statement —Page 4a). In the first instance the Court fails to explain why the state does not have a policy of encouraging mothers to legitimate illegitimate children and why therefore mothers of illegitimate children are allowed to bring actions for wrongful death without regard to legitimation. No justification is given for placing the entire responsibility for legitimation upon the father other than the bare conclusion that "the father of the illegitimate child is usually the parent in this situation who has control over whether a legitimate family unit will exist." (See Jurisdictional Statement—Page 7a) And the Court's bare conclusion that "the father of an illegitimate child who has neither married the mother nor legitimated the child suffers no real loss from the child's death." (See Jurisdictional Statement—Page 4a).

Appellant submits that the Georgia Supreme Court's position that the Appellant in the present case and any father of an illegitimate child who has neither married the mother nor legitimated the child suffers no real loss from the child's death is totally unsupportable. To conclude that a father such as the Appellant who signed the child's birth certificate, paid the child's birth expenses, supported the child, and visited with the child on a daily basis from its birth until its death (A-3 et seq) suffers no loss when that child is killed merely because he has not gone through the formal process of marriage or legitimation is totally indefensible.

More importantly, this Court has stated in the recent decision of *Trimble* v. *Gordon*, supra, a 1977 case, that a statute in violation of the Equal Protection Clause cannot be salvaged by the fact that alternatives exist which would allow one to avoid the impact of the unconstitutionality of the statute. In *Trimble*, supra, this Court ruled that Illinois could not, consistent with the Equal Protection Clause, deny an illegitimate child the

right to inherit by intestate succession from its father when it could so inherit from its mother.

The Illinois Supreme Court in *Trimble*, supra, had argued that the father of the illegitimate child could have left a Will, could have legitimated the daughter by marrying the mother and could have given the daughter the status of a legitimate child by stating in his acknowledgement of paternity his desire to legitimate her. This is precisely the position taken by the Georgia Supreme Court in the present matter. This Court rejected these contentions and concluded:

> "By focusing on the steps that an intestate might have taken to assure some inheritance for his illegitimate children, the analysis loses sight of the essential question: the constitutionality of discrimination against illegitimates in a state intestate succession law. If the decedent had written a Will devising property to his illegitimate child, the case no longer would involve intestate succession law at all. Similarly, if the decedent had legitimated the child by marrying the child's mother or by complying with the requirements of some other method of legitimation, the case no longer would involve discrimination against illegitimates. Hard questions cannot be avoided by a hypothetical reshuffling of the facts."

This Court went on to conclude:

> "Traditional equal protection analysis asks whether this statutory differentiation on the basis of illegitimacy is justified by the promotion of recognized state objectives. If the law cannot be sustained on this analysis, it is not clear how it can be saved by the absence of an insurmountable barrier to inheritance under other and hypothetical circumstances."

This Court has made it abundantly clear that the presence or absence of alternatives for avoiding the impact of statutes challenged on equal protection grounds is immaterial. Consequently, in the present case the fact

that the Appellant could have legitimated the child is of no consequence in deciding the constiutional validity of this challenged provision. As the Supreme Court stated in *Stanley* v. *Illinois*, 405 U.S. 645 (1972):

> "At the outset, we reject any suggestion that we need not consider the propriety of the dependency proceedings that separated the Stanleys because Stanley might be able to regain custody of his children as a guardian or through adoption proceedings. The suggestion is that if Stanley has been treated differently from other parents, the difference is immaterial and not legally cognizable for the purposes of the Fourteenth Amendment. This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone." (Page 647)

Appellant respectfully submits that a conclusion by this Court that Appellant is not entitled to maintain this action for wrongful death because he had the option of legitimating the child would be a triumph of form over substance. The Record reflects without contradiction that the Appellant in this case acknowledged his paternity of the child by execution of the birth certificate, paid the birth expenses, supported the child from its birth until its death and visited with the child on a daily basis. Surely an individual in Appellant's position would justifiably wonder what more he would need to do to legitimize such a child having acknowledged his paternity as a matter of record and having established a meaningful father-son relationship with the child (A-3 et seq).

In discussing Louisiana's Workmen's Compensation Law and in finding that Law in violation of the Equal Protection Clause, this Court addressed a distinction in Louisiana Law which allowed recovery where there was acknowledgement of the child, but denied recovery where there was no acknowledgement. See: *Weber* v. *Aetna Casualty & Surety Company*, 406 U.S. 164 (1972). In addressing this issue in that case the Court concluded:

> "Whatever the merits elsewhere of this contention, it is not compelling in a statutory compensation scheme where dependency on the deceased is a prerequisite to anyone's recovery and where the acknowledgement so necessary to equal recovery rights may be unlikely to occur or legally impossible to effectuate even where the illegitimate child may be nourished and loved."

That is perfectly analogous to the present situation where in his own mind Appellant had done all that was necessary to legitimate his child, having acknowledged that child by the execution of its birth certificate, having paid its birth expenses, having supported it from its birth until its death and having visited with it on a daily basis.

This Court previously addressed this same issue in the case of *Levy* v. *Louisiana*, 391 U.S. 68 (1968). In concluding that illegitimate children could not be denied the right to recover for the wrongful death of their mother consistent with the Equal Protection Clause, this Court concluded:

> "Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would."

Likewise in the present case the legitimacy or illegitimacy of Appellant's child bears no relation to the nature of the wrong inflicted upon the Appellant. The Record shows that Appellant cared for the child, that he nurtured the child and that in the child's death he suffered a wrong and a loss as fully as any natural parent.

For the foregoing reasons Appellant respectfully submits that the Georgia Supreme Court erred in asserting that the present classification may be sustained since Appellant could have avoided any unconstitutional impact by alternative means.

(B) Georgia Code Annotated § 105-1307 Does Not Promote And Is Not Reasonably Related To Any Legitimate State Interest Which May Exist.

Appellant has discussed two of the four interests contended by the Georgia Supreme Court to constitute legitimate state interest justifying the present classification. Appellant has demonstrated through decisions of this Court that the first two asserted legitimate state interests have been held in identical cases not to constitute sufficient justification for the total exclusion of illegitimates from a statutory scheme of recovery. With regard to the remaining two asserted legitimate state interests, Appellant will demonstrate that the present classification does not and can never be expected to promote those state interests.

The final legitimate state interests asserted by the Georgia Supreme Court have generally been considered valid state interests justifying certain classifications. The Georgia Supreme Court concluded that the State of Georgia has a legitimate state interest in promoting legitimate family relationships, in avoiding spurious claims and in setting a standard of morality. (See: Opinion of the Georgia Supreme Court, Jurisdictional Statement—Page 1a). Specifically the Georgia Supreme Court concluded:

> "Thus the state interest in promoting the family as an institution for child rearing and in setting standards of morality are arguably furthered by denying the wrongful death action to fathers of illegitimate children, although granting it to mothers."
>
> (Jurisdictional Statement—Page 7a)

This Court has rejected this logic in general and common sense rejects this logic in this case.

No one would contend that the interests asserted above are not worthy state interests. However, the Georgia Supreme Court totally fails to demonstrate how legitimate family relationships and high standards of morality are promoted by allowing one party to the illegitimate act to recover for the wrongful death of the child which was the product of that act and denying that right to the other party to the illegitimate act. Is the State of Georgia's interests in promoting legitimate family relationships and high standards of morality limited to punishing males who participate in these illegitimate acts, while rewarding the females who participate, by allowing the latter to recover and denying that right to the former? It is as Justice Hill stated in his Dissenting Opinion in the Georgia Supreme Court which is found in the Appendix at Page 8:

> "The majority fails to explain how the State's objective of promoting a legitimate family unit is furthered by denying the father of an illegitimate child an action for that child's wrongful death. The illegitimate child is already dead by the time the means chosen by the State comes into operation. The denial of a claim for a child's wrongful death does not promote the family as an institution for rearing that child in a timely or rational manner regardless of the level of scrutiny employed. The sanction adopted by the state is not suited and comes too late to motivate a father to provide care for his illegitimate child. It treats the father of an illegitimate child different from the mother of that same child and thus constitutes a denial of equal protection."

Justice Hill goes on to conclude in this Dissenting Opinion:

> "The majority seek to distinguish *Glona* v. *American Guarantee and Liability Ins. Co.*, supra, based on the difference in proving paternity vs. maternity, a ground which was expressly rejected in *Trimble* v. *Gordon*, supra, where the Court stated that although a state might adopt a more demanding standard of proof for fathers of illegitimate children than for mothers, the extreme means of complete exclusion of recovery was not permissible. Because I cannot accept at face value the tortfeasor's proffered state rationale or a distinction of *Glona* already rejected by the U. S. Supreme Court, I must respectfully dissent."

Appellant must respectfully submit that this case is controlled by this Court's decision in *Glona* v. *American Guaranty & Liability Insurance Company*, 391 U.S. 73 (1968). In that case this Court found the Louisiana Wrongful Death Statute to be in violation of the United States Constitution. By construction of Louisiana courts, the Louisiana Statute had excluded both the mother and father of illegitimate children from bringing actions for the wrongful death of those children. The issue decided by the Court is best stated in the words of the Court in Footnote 3 of that Opinion:

> ". . . As the Court of Appeals noted, Article 2315 of the Louisiana Civil Code, providing for wrongful death recovery, gives a cause of action to 'the surviving father and mother of the deceased, or either of them . . .' The statute does not state 'legitimate' father or 'legitimate' mother, but the Louisiana courts have held that a decedent must be legitimate in order for an ascendant or sibling to recover for his death."

In *Glona*, supra, this Court was confronted with an effort by the mother of an illegitimate child to bring an action for the wrongful death of that child. Appellant submits that the same reasoning used by the Court to allow the mother in that case to bring an action for the wrongful death of her child applies to the Appellant in the present case as the father of such a child. This Court concluded:

"Yet we see no possible rational basis for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death. A law which creates an open season on illegitimates in the area of automobile accidents gives a windfall to tortfeasors. But it hardly has a causal connection with the 'sin' which is we are told, the historic reason for the creation of the disability. To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a state to draw such 'legal' lines as it chooses." (Page 74)

Appellant submits that *Glona*, supra, stands for the proposition that parents of illegitimate children may not be treated differently from parents of legitimate children consistent with the Equal Protection and Due Process Clauses of the United States Constitution.

This Court additionally addressed the ability of such a classification as the present one to promote the legitimate state interest of avoiding spurious claims. In *Jiminez* v. *Weinberger*, 417 U.S. 504 (1974) this Court stated:

"We recognize that the prevention of spurious claims is a legitimate governmental interest and that dependency of illegitimates in appellants' subclass, as defined under the federal statute, has not been legally established even though, as here, paternity has been acknowledged."

Recognizing this, this Court went on to conclude in *Jiminez*, supra:

". . . It does not follow, however, that the blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims."

Likewise, in *Weber* v. *Aetna Casualty & Surety Company*, supra, this Court concluded:

". . . Nor can it be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation."

The point to be made is that whether the state's interests be phrased as that of promoting legitimate family relationships, insuring a high standard of morality or preventing spurious claims, this Court has uniformly acknowledged that classifications like the present one do nothing to promote those state interests and consequently cannot sustain a challenge based on the Equal Protection Clause of the United States Constitution.

Georgia Law imposes the primary support obligation for illegitimate children on the father of those children. *Georgia Code Annotated* § 74-202 provides:

"§ *74-202 Father's Obligation to Support.*

The father of an illegitimate child shall be bound to maintain him until said child reaches the age of eighteen, marries or becomes selfsupporting, whichever occurs first. The obligation shall be good consideration to support a contract by him. He may voluntarily discharge this duty; if he shall fail or refuse to do it, the law will compel him: provided however, that the Superior Court shall have the power, upon petition of the father to require the mother of an illegitimate child to contribute to such support upon a determination that the financial circumstances of both the father and the mother are such that justice and equity require the mother to share in or have responsibility for such support."

That a state may constitutionally do this has been affirmed by this Court in *Gomez* v. *Perez*, 409 U.S. 535 (1973).

Consequently, we have reached a point where an illegitimate child may recover for the wrongful death of

its mother (*Levy*, supra); a mother may recover for the wrongful death of its illegitimate child (*Glona*, supra); an illegitimate child cannot be denied the right of inheritance from its father by intestate succession (*Trimble*, supra); the father of an illegitimate child can be held primarily responsible for its support (*Gomez*, supra; and *Georgia Code Annotated* § 74-202); illegitimate children cannot be denied workmen's compensation benefits because of their illegitimacy (*Weber*, supra); and the father of an illegitimate child is deemed to have protectable interest in his children (*Stanley*, supra).

Each of the above decisions was made upon equal protection grounds. Appellant respectfully submits that the collective effect of these decisions demands a finding that the Georgia Wrongful Death Statute also violates the Equal Protection Clause of the United States Constitution. Appellant submits that the state might have concluded justifiably that there should be a difference in the rights accorded children as the products of an illegitimate act, and the rights accorded the adults who are participants in that illegitimate act. However, Appellant respectfully submits that there is no justification by which the state can assert the promotion of legitimate family relationships and high standards of morality as a legitimate state interest; and thereby deny one party to an illegitimate act the right to recover for the wrongful death of the product of that act and yet award that right of recovery to the other participant in the same illegitimate act.

1) *The Decision of This Court In* Quilloin v. Walcott, *United States Supreme Court, Case No. 76-6372 Is Materially Distinguishable From the Present Case.*

In *Quilloin*, supra, this Court concluded that equal protection principles do not require that the authority of the father of an illegitimate child to veto an adoption

be measured by the same standard as is applied to a divorced father, from whose interests the former's are readily distinguishable. Appellant respectfully submits that that case is materially different from the present case. Certainly the State of Georgia may assert as a legitimate state interest the promotion of a legitimate family relationship. Certainly that state interest may be promoted by a classification which draws distinctions between the rights of divorced parents and parents of illegitimate children. That was the situation in *Quilloin*, supra. However, it is another matter entirely to demonstrate that the legitimate state interest of promoting family relationships is furthered by a classification like the present one which rewards one party to the illegitimate act and seeks to promote the legitimate state interest by punishing the other party to the illegitimate act. That is the present situation.

Appellant's position is that the State of Georgia might constitutionally have denied the mother and the father of illegitimate children the right to recover for the wrongful death of that child based on the asserted state interests of promoting legitimate family relationships. However, Appellant submits that the State of Georgia cannot constitutionally award the right of recovery to the mother of an illegitimate child and deny that same right to the father. In reality, either classification is probably constitutionally infirm in view of this Court's ruling in *Glona*, supra.

Quilloin, supra, is further distinguished by the very language of the Court. Justice Marshall speaking for the Court, states:

> "Although appellant was subject, for the years prior to these proceedings, to essentially the same child support obligation as a married father would have had, compare § 74-202 with § 74-105 and § 30-301, he has never exercised actual or legal custody

over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."

In the present case the Record demonstrates without contradiction through findings of fact by the trial court that the Appellant did shoulder significant responsibility with regard to the supervision, education, protection and care of his child. The Appellant acknowledged the child by executing the birth certificate, paid the birth expenses for the child, supported the child from its birth until its death and visited with the child on a daily basis. These facts alone render the present case materially distinguishable from *Quilloin*, supra, and *Quilloin* does not prevent a finding in the present case that the Georgia Wrongful Death Statute is in violation of the Equal Protection Clause of the United States Constitution.

2) ***The Arguments Advanced by the Appellee in the Supreme Court of Georgia Do Not Address the Issues Presently Before the Court.***

In his Motion to Dismiss filed in this Court and in the Georgia Supreme Court the Appellee makes two contentions which Appellant submits simply begs the question and totally fail to address the issue before this Court. Initially, the Appellee contends that the Georgia Legislature has provided for a method of recovery in cases like the present one without having to open "Pandora's box of proving paternity in the death action which would ultimately result if Appellant's position were upheld." In short, Appellee contends that because the Georgia Wrongful Death Statute allows the administratrix of the estate of the deceased child to bring an action for wrongful death, that it is not constitutionally infirm. Appellant submits that the question before this Court is not whether the state has provided an alternative scheme of recovery, but whether that alternative scheme

of recovery is consistent with the Equal Protection Clause of the United States Constitution.

Appellant contends that simply because the tortfeasor will not be allowed to go free, this Court should not be concerned with the Equal Protection Clause concerning the rights of the father of this illegitimate child. However, this Court has concluded to the contrary in *Weber* v. *Aetna Casualty & Surety Company*, 406 U.S. 164 (1972). The Court, per Mr. Justice Powell concluded:

> "The court below sought to distinguish *Levy* as involving a statute which absolutely excluded *all* illegitimates from recovery, whereas in the compensation statute in the instant case acknowledged illegitimates may recover equally with legitimate children and 'the unacknowledged illegitimate child is not *denied* a right to recover compensation, he being merely relegated to a less favorable position as are other dependent relatives such as parents . . ."

This Court went on to state in *Weber*, supra:

> ". . . The Louisiana Supreme Court likewise characterized *Levy* as a tort action where the tortfeasor escaped liability on the fortuity of the potential claimant's illegitimacy, whereas in the present action full compensation was rendered, and 'no tort feasor goes free because of the law.' "

This Court rejected that analysis and ruled in *Weber*, supra that:

> "We do not think *Levy* can be disposed of by such finely carved distinctions. The Court in *Levy* was not so much concerned with the tortfeasor going free as with the equality of treatment under the statutory recovery scheme. Here, as in *Levy*, there is impermissible discrimination."

Appellant respectfully submits that the foregoing logic and the foregoing analysis by this Court disposes of the Appellee's argument which simply begs rather than answers the question before the Court.

Secondly, Appellee contends in his Motion to Dismiss before this Court and contended in the Georgia Supreme Court that a ruling in favor of the Appellant in the present matter would simply create chaos since defendants would be exposed to possible double recovery. The Appellee contended in his Motion to Dismiss that "A defendant would be faced with the distinct possibility of paying twice or going to the problem and expense of attempting to locate a natural father which, after a period of time, would be practically impossible." This argument asserted by the Appellee simply will not survive even cursory analysis. With regard to the prospect of double recovery, Appellant points out that in *Glona*, supra, this Court declared that the mother of an illegitimate child may maintain an action for the child's wrongful death. Presumably, this ruling by the Court placed the mother of this illegitimate child ahead of some scheme of priority established by the State of Louisiana. That was done without creating the possibilty of double recovery since implicit in this Court's ruling that the mother was entitled to recover would be a ruling that she would be entitled to recover to the exclusion of all others and no defendant would be faced with the possibility of double recovery. Likewise, in *Levy*, supra, this Court ruled that illegitimate children may maintain an action for the wrongful death of their mother. Presumably, this finding in favor of the children, displaced a scheme of priority established by the state. It did so without creating chaos and without creating the prospect of double recovery.

As regards the Appellee's argument that a defendant may be put to the expense and difficulty of locating the natural father, states have found relatively simple ways and means of avoiding this problem. For example, in the State of Georgia the adoption statute provides for an attempt to notify the putative father of a child prior to adoption or at least allegations that the putative

father has failed, without justification, to support the child or to maintain any meaningful relationship with the child. See: *Georgia Code Annotated* § 74-406. This is a reasonable requirement since if a petitioner for adoption makes an effort to locate the putative father or through evidence proves that the putative father has not supported or maintained any relationship with the child, then at least that putative father has been accorded due process and equal protection under the law. On the other hand, if notice to the putative father results in the institution of proceedings by the putative father contending that he has supported the child and that he has maintained a meaningful relationship with the child then, likewise, the putative father has been accorded due process and equal protection under the law. Nothing would prevent the State of Georgia from the implementation of an identical scheme of recovery in the area of wrongful death.

In short, the Appellee fails to recognize any middle ground between absolute recovery for all fathers of illegitimate children and absolute exclusion of all fathers of illegitimate children when in reality, a middle ground is easily accessible which would also satisfy the Due Process and Equal Protection Clauses of the United States Constitution.

II.

THE GEORGIA WRONGFUL DEATH STATUTE WHICH ALLOWS THE MOTHER OF AN ILLEGITIMATE CHILD TO RECOVER FOR ITS WRONGFUL DEATH BUT DENIES THAT RIGHT TO THE FATHER CONSTITUTES IMPERMISSIBLE DISCRIMINATION BASED ON SEX.

Since *Reed* v. *Reed*, 404 U.S. 71 (1971), this Court has emphasized that statutory classifications that distinguish between males and females are subject to scrutiny under the Equal Protection Clause. The Court further indicated that:

> "To withstand constitutional challenge previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." (*Craig* v. *Boren*, 429 U.S. 190 (1976))

Finally this Court has insisted that gender-based legislative classification, premised on overbroad generalization concerning the behavior, proclivities and preferences of the two sexes, cannot be tolerated under the Constitution. *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); and *Stanton* v. *Stanton*, 421 U.S. 7 (1975).

The decision of the Georgia Supreme Court in this case is replete with the kind of overbroad generalizations and assumptions about "the way men and women are", a premise this Court has uniformly rejected. In its Opinion the Georgia Supreme Court justified its decision by concluding that the state has a legitimate state interest in encouraging fathers of illegitimate children to legitimate the child by petition or by marrying the mother. The Court totally failed to address the responsibility of the mother in this situation and allows her the right to

recover for the wrongful death of her child without regard to an effort to legitimate the child by petition or an effort to marry the father. The Court went on to conclude without documenting that "in most circumstances it is the mother, not the father, who raises and cares for the illegitimate child." Finally, the Court concludes with the archaic notion that the father of the illegitimate child is usually the parent in this situation who has control over whether a legitimate family unit will exist. (See Georgia Supreme Court Opinion, Jurisdictional Statement—Page 7a).

The present case demonstrates the absolute fallacy of the overbroad generalizations engaged in by the Georgia Supreme Court. The Appellant in the present case is at the opposite extreme of illegitimate fathers as depicted by the Georgia Supreme Court. This Appellant maintained a meaningful relationship with his child from its birth until its death, supported the child from its birth until its death and acknowledged the child as his own by executing the birth certificate and paying the birth expenses and giving the child his name. This case alone demonstrates the fallacy of conclusive and irrebuttable presumptions with regard to the behavior of all fathers of illegitimate children.

In this case unlike the other cases involving gender-based discrimination decided by this Court, there is no statistical evidence to support the overbroad conclusions of the Georgia Supreme Court. For instance, in *Reed*, supra, the proposition that men have more business experience than women was not without empirical support. Likewise in *Frontiero*, supra, and *Weinberger*, supra, the statistics tendered by the government to document mens' non-dependency and their labor market orientation were considerably more impressive than the naked generalized assertion offered by the Georgia Supreme Court in the case at bar. This Court has not favored the maintenance

of classifications of this type based on statistical analysis even when offered. In *Craig* v. *Boren*, supra, this Court concluded:

> "There is no reason to belabor this line of analysis. It is unrealistic to expect either the members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause."

The Court went on to conclude in *Craig* v. *Boren*, supra:

> "In sum the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose fitting generalities concerning the drinking tendencies of aggregate groups."

Unlike *Craig* v. *Boren*, supra, no statistics were offered to prove the generalizations in the present case and Appellant submits that even if supported by empirical data, the loose fitting generalities engaged in by the Georgia Supreme Court do not warrant the present classification of the Georgia Legislature.

In *Califano* v. *Goldfarb*, 430 U.S. 199 (1977) this Court made it clear that in engaging in classifications, states cannot rely on "old notions such as assumptions as to dependency that are more consistent with the role-typing society has long imposed than with contemporary reality." This Court concluded in *Califano*, supra, that "such classifications, however, have frequently been revealed on analysis to rest only upon old notions and archaic and overbroad generalizations and so have been found to offend the prohibitions against denial of equal protection under the law."

Even assuming that, by some stretch of the imagination, the generalized interest asserted by the Georgia Supreme Court could be construed as legitimate objectives to be promoted by a gender-based classification, there is absolutely no showing and no logic which would support a conclusion that these objectives are promoted by the present classification. This Court has rejected arguments such as administrative convenience and burden of proof as constituting legitimate objectives in this area. See: *Califano* v. *Goldfarb*, 430 U.S. 199 (1977).

The remaining objectives loosely asserted by the Georgia Supreme Court are not documented and cannot possibly be promoted by the present classification. The Georgia Supreme Court as previously stated, indicates that the present classification might be construed to promote legitimate family relationships and high standards of morality. However, as pointed out by Justice Hill in his dissent, the majority never demonstrates how the present classification would operate to attain that objective. As Justice Hill points out, it is preposterous to assume that individuals would father illegitimate children in order that they might recover for their wrongful death. (See A-9).

Moreover, while the Legislature might arguably have attained its objectives by excluding both the mother and the father of illegitimate children, it is totally inconceivable that the objective of a legitimate family relationship could be promoted by allowing one party to the illegitimate act to recover for the wrongful death of the child and denying that right to the other party in all circumstances, creating an impermissible irrebuttable presumption.

Appellant respectfully submits that the present classification constitutes gender-based discrimination in violation of the Equal Protection Clause of the United States Constitution and based on the foregoing analysis and decisions cannot be constitutionally sustained.

CONCLUSION

The Georgia Wrongful Death Statute as embodied in Georgia Code Annotated § 105-1307 denies the Appellant and those similarly situated due process and equal protection of the law. Two of the allegedly valid State interests asserted by the Georgia Supreme Court have been rejected by this Court as insufficient to warrant the total statutory exclusion of a class of illegitimates. The previous decisions of the Court in this area demonstrate this Court's position that the remaining purported State interests asserted by the Georgia Supreme Court are not promoted by the present classification and could never be promoted by the present classification.

This Court's recent decision in *Quilloin* v. *Walcott*, supra, is readily distinguishable since it is one thing for a State to attempt to promote legitimate family relationships by discriminating between divorced parents and parents of illegitimate children. It is quite another to contend that that goal can be met by discriminating between two parties to the illegitimate act, allowing one of those parties to recover and denying that right to the remaining party.

Appellee's arguments concerning the prospect of being faced with double recovery and the prospect of having difficulty proving paternity and locating the illegitimate fathers simply beg the question and do not address the validity of the present classification and its consistency or inconsistency with the Equal Protection Clause of the United States Constitution.

The present classification as embodied in the Georgia Wrongful Death Statute constitutes impermissible gender-based discrimination in violation of the Equal Protection Clause. The Georgia Supreme Court and the Appellee both fail to demonstrate what important governmental objectives are promoted by this classification and totally

fail to demonstrate any manner in which this classification could possibly be construed to promote any important governmental objectives. Moreover the present decision consist merely of overbroad generalizations concerning the behavior and proclivity of the two sexes which this Court has consistently refused to tolerate.

For the foregoing reasons, Appellant respectfully submits that the Decision of the Georgia Supreme Court should be reversed. This Court should find that the Georgia Wrongful Death Statute as embodied in Georgia Code Annotated § 105-1307 denies the Appellant and those similarly situated due process and equal protection of the laws and the Appellant should be declared entitled to recover for the wrongful death of his child as initially decreed by the trial court in the Superior Court of Richmond County, Georgia.

Respectfully submitted,

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